IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.307 OF 1994

1. Bhagwan Atmaram Bhoir
2. Pandit Atmaram Bhoir .. Appellants (Org.Accd.Nos. 1 & 2)

Vs.

The State of Maharashtra .. Respondent

WITH

CRIMINAL APPEAL NO. 309 OF 1994

1. Krishna Mahadu Gavali
2. Ananta Gopal Gavali
3. Nanu Rambharansingh .. Appellants (Org.Accd.Nos. 3, 7 & 8)

Vs.

The State of Maharashtra .. Respondent

WITH

CRIMINAL APPEAL NO. 343 OF 1994

Raju @ Abdul Rajjak Shaikh .. Appellant (Org.Accd.No.4)

Vs.

The State of Maharashtra .. Respondent

Mr. Shirish Gupte with Mr. A.P. Mundargi, Mr. Z.N. Kazi and Mr. M.K. Kocharekar for the appellants in Cri.Appeal No.307/94.

Mrs. Manjula Rao for appellants in Cri.Appeal Nos.309/94 and 343/94.

Dr. F.R. Shaikh, APP for Respondent-State in all the appeals.

CORAM: S.S. PARKAR &
ANOOP V. MOHTA, JJ.

Date : March 03 & 04, 2005.

ORAL JUDGMENT (Per S.S. Parkar,J.):

1. These three appeals arise from the Judgment and Order dated 28/4/1994 delivered by the II Additional Sessions Judge, Thane convicting the appellants in the three appeals, who are original accused nos.1 to 4, 7 and 8 in Sessions Case No.622 of 1990 for offences under Sections 302, 364, 201 all read with Section 149 of IPC and for offence under Section 147 of IPC. In addition, appellants - original accused nos. 1,2 and 7 were convicted for offence under Section 148 of IPC. For offence under Section 302 of IPC all the appellants were sentenced to RI for life and to pay a fine of Rs.1000/- each in default RI for three months. For offence under Section 364 of IPC all the appellants were sentenced to RI for 7 years and to pay a fine of Rs.500/- each in default RI for one and half month. For offence under Section 201 of IPC all the appellants were sentenced to RI for four years and to pay a fine of Rs.500/- each in default RI for one and half month. For offence under Sections 147 and 148 the appellants

were not awarded separate sentences. Since all these appeals arise in respect of the same incident in the same Sessions Case from the common judgment in which the appellants were tried with two more accused who were acquitted, all the appeals were heard together and are being disposed of by this common judgment.

2. The incident had taken place on the night of 6th of May 1990 after 10 p.m. when the members of both the sides were present in a ‘Mandap’ which was erected in front of the house of one Gangubai for the purpose of haldi ceremony in connection with the marriage of one Madhukar Bhoir and his sister Asha Bhoir. The names of accused nos.1 and 2 appeared in the invitation card produced on record at Exh.81 as two of the several persons named as the persons who had extended invitation to the guests. The presence of both the sides at the said occasion was not only natural but was not disputed at the trial.

3. After the haldi ceremony was over in the early hours of the night, it was time for serving the dinner to the persons who had assembled there. At that time there was pelting of chairs and assault was made with choppers by accused nos.1,2 and 7 on deceased Suhas who was the brother of complainant P.W.1 Sudhir whose

house is situated hardly at a distance of three minutes' walk from the place of the incident. Some other associates of accused nos.1,2 and 7 also assaulted Suhas with fist blows and kicks. Suhas was then dragged outside the Pandal and removed in a jeep which was parked outside the Pandal by accused nos.1,2 and 7 and their associates. Complainant Sudhir, the brother of deceased Suhas, therefore, lodged his complaint at the police station which is Exh.33 mentioning about the assault on Suhas made by accused nos.1,2 and 7 with choppers and by others with fist blows and kicks and thereafter having abducted Suhas in a jeep from the aforesaid venue to a destination unknown to him. On the basis of the complaint Exh.33 crime was registered by the Kolshewadi Police Station being C.R. No.I-39/1990 for offences under Sections 147, 148, 149, 363 and 366 of IPC at about 11.30 hours that night. The dead body of Suhas was found in the afternoon of following day on goods track near Kalyan Railway Line. The dead body was identified by the complainant and his father to be of Suhas. Same night accused no.1 had also lodged his complaint at the same police station alleging that deceased Suhas and his associates assaulted him and his brother i.e. accused no.2 as a result of which his brother Pandit - accused no.2 was admitted to the private hospital of Dr.

Mahajan. The said complaint also mentioned that they were assaulted with fire arm and choppers. That complaint was registered under C.R. No.I-40/1990 at about 23.45 hours that night. In the morning of 7/5/1990 spot panchanama Exh.64 was drawn at the place of incident which was in Chikanipada in front of the house of Gangubai Gaikwad where the Pandal was erected and haldi program was arranged on the previous night. The said panchanama Exh.64 was drawn in respect of both the cross complaints registered by the police. On the same day i.e. on 7/5/1990 accused no.1 Bhagwan Bhoir and accused no.2 Pandit Bhoir were arrested. After the recovery of the dead body from near Kalyan Railway Line the offence under Section 302 of IPC was added to C.R. No.I-39/1990. Inquest panchanama Exh.59 was drawn on the dead body and the dead body was sent for post mortem examination. The panchanama of the place where the dead body was found was also drawn which is at Exh.57.

4. In the course of the investigation two Jeeps, one standing in the name of father of accused nos.1 and 2 and another belonging to accused no.7 were attached on 8/5/90 under common panchanama Exh.53. On the seat cover of Jeep No.MZM-7832 belonging to accused no.7 red coloured stains were found. That

portion of the seat cover was cut out, sealed and was later on sent to the office of C.A. for examination. The clothes of the deceased were attached after post mortem examination on 8/5/1990 under panchanama Exh.59. On 9/5/1990 the statements of the eye witnesses and other witnesses were recorded. While in custody two blood stained choppers being article nos.8 and 9 were recovered at the instance of accused no.1 on 10/5/1990 under memorandum statement Exh.46 and seizure panchanama Exh.47. On the same day four clothes i.e. two shirts and two pants belonging to accused nos.1 and 2 were also recovered at the instance of accused no.1 under memorandum statement Exh.50 and seizure panchanama Exh.50-A which are article nos.10, 11, 12 and 13, three of which were stained with blood.

5. In the course of investigation accused nos.3,5 and 6 were arrested on 22/5/1990 while accused no.4 was arrested on 30/6/1990 and accused no.8 on 15/9/1990, who were not named in the complaint. The clothes of accused nos.3,5 and 6 were seized by the I.O. on the date of their arrest. Pursuant to requisition letter dated 2/7/1990 T.I. Parade was held on 6/7/1990 in respect of accused nos.3,5 and 6 who were arrested on 22/5/1990 and of accused no.4 who

was arrested on 30/6/1990 as they were not named in the complaint. Charge-sheet was filed against accused nos.1 to 6 on 3/8/1990.

6. Subsequently, accused no.7 who was named in the complaint came to be arrested on 13/9/1990. On 15/9/1990 there was recovery of chopper article no.22 at the instance of accused no.7 vide memorandum of statement Exh.61 and seizure panchanama Exh.62. Pursuant to the requisition sent on 20/9/1990, T.I. Parade was held for identification of accused no.8 on 26/9/1990. Thereafter on 4/10/1990 supplementary charge-sheet was filed impleading accused nos.7 and 8 as accused. The muddemal articles were initially sent to the office of C.A. for examination under forwarding letter dated 7/6/1990 Exh.68 in respect of which C.A. report dated 24/9/1990 Exh.69 was received. Chopper recovered at the instance of accused no.7 on 15/9/1990 was sent to the office of C.A. for examination under forwarding letter dated 27/9/1990 Exh.70. Thereafter C.A. reports Exhs.71 and 72 were received. In connection with crime registered under C.R.No.I-40/1990 i.e. the complaint of accused no.1, "A" Summary was obtained from the court of JMFC, Kalyan. However, after completion of the investigation in C.R. No.I-39/1990 charge-sheet

was filed in the present case and case was committed to the Sessions Court.

7. In the Sessions Court charges were framed against eight accused persons for offences under Sections 147, 148 and for offences under Sections 302, 364 and 201 read with Section 149 of IPC, to which the accused pleaded not guilty. The charge for offence under Section 148 was framed only against accused nos.1,2 and 7 who were allegedly armed with choppers and had assaulted the deceased with choppers. As all the accused pleaded not guilty to the charges framed against them, 14 witnesses were examined on behalf of the prosecution. Those witnesses include four eye witnesses to the incident who are P.Ws.1 to 4 including complainant P.W.1, the brother of deceased Suhas. P.W. 5 is Medical Officer Ashok Bhide who had conducted post mortem on the dead body of deceased Suhas. P.W. 6 is Special Executive Magistrate Vasant Patil who held Test Identification Parades on 6/7/1990 and 26/9/1990. P.Ws. 7 to 13 are the panch witnesses who acted as panchas for the scene of offence panchanma, inquest panchanama and the recovery panchanamas. Lastly, P.W.14 is P.S.I. Raja Hulyalkar who investigated the case. No defence witness was examined. The defence of the accused nos.2 to 8 is of

denial and false implication. According to accused no.1 he had gone to attend the haldi program at the house of Gangubai Gaikwad and when he was sitting for dinner inside the Pandal, suddenly deceased Suhas and his associates arrived there and fired shots towards the place where he was sitting. The associates of deceased Suhas assaulted accused no.2 Pandit Bhoir with chopper as a result of which he sustained injury and, therefore, was taken in a Jeep to the hospital of Dr. Mahajan. Thereafter he went to the police station and lodged his report. He has also stated that police arrested him then and there. According to him he has been falsely roped in the case.

8. After considering the evidence on record, the trial court by the impugned judgment and order dated 28/4/1994 acquitted original accused nos.5 and 6 but convicted the appellants and sentenced them as follows:-

. Accused Nos.1,2,3,4,7 and 8 were convicted for offence under Section 302 read with Section 149 of IPC and each of them were sentenced to life imprisonment and to pay a fine of Rs.1000/- each in default to undergo RI for three months. They were also convicted for offence under Section 364 read with Section 149 of

IPC and sentenced to RI for 7 years and to pay a fine of Rs.500/- each in default to undergo RI for one and half month. They were also convicted for offence under Section 201 read with Section 149 of IPC and sentenced to RI for 4 years and to pay a fine of Rs.500/- each in default to undergo RI for one and half month. The substantive sentences were directed to run concurrently. All the aforesaid accused/appellants were also convicted for offence under Section 147 of IPC but no separate sentence was imposed on that count. Accused nos.1,2 and 7 were, in addition, convicted for offence under Section 148 of IPC but no separate sentence was imposed on any of them on that count. The said judgment and order of conviction and sentences is under challenge in the above three appeals filed by the convicted accused. There is no appeal preferred by the State against the order of acquittal of accused nos.5 and 6.

9. In Criminal Appeal No.307/1994 filed by accused Nos.1 and 2, Mr. Gupte argued on behalf of accused no.1 while Mr. Mundargi argued on behalf of accused no.2. Mrs. Rao argued for the appellants in the other two appeals filed by rest of the convicted accused i.e. accused nos.3,7,8 and 4.

10. Mr. Gupte contended that the Investigating Agency did not investigate the complaint filed by accused no.1 though accused no.2 was admitted in the hospital at about 10.40 p.m. that night. He expressed doubt about the presence of P.W. Nos.2 to 4 at the place of incident as their names were not mentioned in the complaint and their statements were recorded on 9/5/1990 i.e. after four days and, therefore, no reliance can be placed on the evidence of P.W.Nos.2 to 4 when important omissions have been pointed out in their police statements. He submitted that the other witnesses have not given proper sequence of the events and, therefore, their presence at the place of incident is doubtful. He also commented on the evidence of P.W.1 who stated that there was pool of blood in the Pandal due to the injuries suffered by Suhas when he was assaulted there but spot panchanama does not indicate the existence of pool of blood in the Pandal. Mr. Mundargi contended on behalf of accused no.2 that accused no.2 himself being injured and admitted in the hospital same night at about 10.40 p.m. he could not have been convicted for the offence of murder by application of Section 149 of IPC which took place after deceased Suhas was allegedly abducted by the accused persons. Lastly, Mrs. Rao appearing for the rest of the convicted

accused contended that accused nos.3,4 and 8 could not have been convicted only on the basis of T.I. Parade in the absence of any other corroborating circumstance. She argued that when some of the accused were residents of the same locality they would have been identified and named in the F.I.R. itself had they been present at the place of offence. She criticises the holding of the first Parade on the ground of delay in respect of accused nos.3 and 8 and challenged the identification of accused no.4 in T.I. Parade when there is no evidence of the dummies having squint eyes and, therefore, it was easily possible for the witnesses to identify accused no.4 if they had been told that he was having one squint eye. As regards accused no.7 Mrs. Rao argued that he cannot be convicted on the basis of version of eye witnesses alone and the recovery of chopper at his instance on 15/9/1990 was without any blood stains on it. As against that Mr. Shaikh on behalf of the State, after taking us through the reasoning of the trial court, argued that all the appellants were rightly convicted and there is no good reason to interfere in the order of conviction recorded by the trial court.

11. Considering the evidence on record and the arguments advanced before us, it would be convenient

to deal with the cases of accused nos.3,4 and 8 first, none of whom were named in the F.I.R. and the only evidence on the basis of which they have been convicted is their identification at the T.I. Parade. The complaint Exh.33 mentions the names of accused nos.1,2 and 7 only but refers to the presence of other persons who had assaulted deceased Suhas in the Pandal with fist blows and kicks and had participated in dragging Suhas from the Pandal to the Jeep parked outside the Pandal by which he was abducted. Out of eight accused persons, accused nos.1,2 and 7 were named in the complaint for having assaulted the deceased with choppers. The other five accused persons were not named, but after their arrest they were presented for identification at the T.I. Parades. Out of these five accused persons, accused nos.5 and 6 were not identified at the T.I. Parade and, therefore, they were acquitted. Accused Nos.3,4 and 8 were convicted on the basis of identification at the T.I. Parade. Out of these three accused persons, accused no.3 was arrested on 22/5/1990 and, therefore, it was contended by Mrs. Rao that the T.I. Parade which was held about one and half month after his arrest should not be attached any importance as there is no explanation given for holding of the T.I. Parade for accused no.3 so belatedly along with

accused nos.5 and 6. As per the evidence of I.O. requisition was sent on 2/7/1990 for holding T.I. Parade in respect of accused nos.3,4,5 and 6 and the same was held on 6/7/1990. The identification of accused no.3 at the T.I. Parade cannot be disbelieved merely on the ground that T.I. Parade was held belatedly without any explanation given by I.O. But it is further pointed out on behalf of the appellants that there were 25 dummies brought by the Jailor and all the four accused i.e. accused nos.3,4,5 and 6 were made to stand among the dummies for identification at one and the same time when normally not more than two accused should be presented for identification at the T.I. Parade at a time.

12. From the evidence of the Special Executive Magistrate P.W.6, who held T.I. Parade, it appears that the accused were asked to take their position among the dummies in the presence of both the panchas, one of whom was sent to bring the identifying witnesses. It is, therefore, argued that since both the panchas knew the position where the accused had stood among the dummies, there was no guarantee that the panch who had gone to bring the witnesses would not have told the witnesses about the order in which the accused were standing among the dummies. Accused

no.3 was identified at the T.I. Parade by P.W.1 and P.W.4 and not by all the eye witnesses. As regards accused no.4, he was identified by all the four eye witnesses at the T.I. Parade. It is significant to point out that accused no.4 is stated to have one squint eye. We are told by the learned defence advocate Mrs. Rao that he is almost blind from his left eye which cannot be considered even as squint eye and unless other dummies with similar eyes were arranged in the Test Identification Parade, the identification of accused no.4 at such parade is absolutely unreliable because the witnesses could have been told by the police that accused no.4 was having squint eye and in the absence of other similar persons standing in the T.I. Parade any witness could have identified him easily and, therefore, such identification looses importance or significance. In this connection it is pertinent to point out and consider that probably because of this special peculiarity in the features of accused no.4 that he was identified by all the four eye wintesses when no other accused was identified by all the four eye witnesses and accused nos. 5 and 6 were not at all identified by any of the eye witnesses including the complainant P.W.1. Accused no.3 could be identified only by two eye witnesses but significantly accused

no.4 having a squint eye was identified by all the four eye witnesses. There is nothing on record, either in the evidence of the Executive Magistrate or in the panchanama Exh.42, which records the proceeding of the T.I. Parade, that the dummies included some persons having left squint eyes or eyes with similar appearance as that of accused no.4. In his cross-examination the Executive Magistrate has admitted that accused no.4 was having squint left eye and he could not tell whether at the time of first T.I. Parade held on 6/7/1990 there was any other dummy person with squint eye. If no dummies having squint eyes were included at the T.I. Parade, holding of T.I. Parade vis-a-vis accused no.4 becomes a farce and looses its evidentiary value. One more lacuna or lapse on the part of the Executive Magistrate has been brought on record through his cross-examination when he admitted that he did not enquire from the identifying witnesses whether after the incident and upto the time of holding of T.I. Parade culprits were shown to them.

13. Accused No.8 was identified by P.W.1 complainant and eye witness P.W.3 at the T.I. Parade. However, P.W.3 in his deposition, in the examination-in-chief itself, has stated that he

identified one culprit pointing out his finger at accused no.4 only. It may be mentioned here that in the second T.I. Parade held on 26/9/1990 though according to the deposition of Executive Magistrate both P.W.1 as well as P.W.3 had identified accused no.8, P.W. 3 has made a mention only in respect of T.I. Parade held on 6/7/1990 where he was present along with other three eye witnesses and he had identified only one culprit i.e. accused no.4 but in his deposition he has not referred to his identifying accused no.8 at the parade held on 26/9/1990. The learned defence advocate, therefore, rightly contended that the identification of accused no.8 by P.W.1 alone cannot be relied, the identifying witness P.W.3 having not stated so in his substantive evidence.

14. On behalf of accused reliance is placed on some of the judgments of this Court, to which reference may be made at this stage. In the case of Ganesh Bhagwati Pandian vs. State of Maharashtra reported in **1985 Cri.L.J. 191**, Division Bench of this Court held that if the suspect was having a clean shaven head with shendi (tuft of hair) and in the identification parade only one person had clean shaven head with ‘shendi’ (tuft) i.e. of the suspect, the identification parade is a farce and, therefore,

identification parade was not relied by the Court. In the said case it was also held that if the two suspects are dissimilar in appearance two separate parades should be held. The ratio of the aforesaid decision would squarely apply to the case of accused no.4 who was having a squint eye.

15. Reliance is then placed on the decision of the Division Bench of this Court in the case of Vilas Vasantrao Patil vs. The State of Maharashtra reported in **1996 Cri.L.J. 1854**. In that case identification was held unreliable for non-compliance with instructions contained in the Criminal Manual. In another judgment of the Division Bench of this Court delivered in the case of Sanjay Dagadu Jadhav vs. The State of Maharashtra reported in **1997 ALL MR (Cri) 197**, it was held that instructions contained in Criminal Manual are to be strictly followed. In that case the Magistrate did not testify that there was no opportunity for identifying witnesses and accused to see each other before parade and, therefore, it was held that evidence of identifying parade could not be accepted.

16. Reference may be made to the judgment of the Supreme Court in the case of Wakil Singh and ors. vs.

State of Bihar reported in **AIR 1981 SC 1392** in which none of the witnesses had given any description of the dacoits in their statements or oral evidence nor had given identification marks about the accused and, therefore, the Supreme Court held that conviction cannot be based only on the identification of the accused by a single witness. On the basis of aforesaid judgment of the Supreme Court it was contended by Mrs. Rao that in this case also since the witnesses had not given description of the accused either in their earlier statements or in the court, no significance can be attached to the identification of accused nos.3,4 and 8 at the T.I. Parade. It is not in dispute that these three accused have been convicted only on the basis of their identification at T.I. Parade. Mrs. Rao had also contended that accused no.3 is the cousin of accused no.7 and residing in the same locality and, therefore, P.W.1 who knew accused no.7 must have known accused no.3 as well and, therefore, had he been present at the place of incident, P.W.1 would have noticed him and mentioned his name in the F.I.R. itself. Considering the points raised and the authorities cited and defects in holding of the T.I. Parade pointed out, in our view, it would not be safe to convict accused nos.3,4 and 8 only on the basis of their

identification at the T.I. Parade. In the aforesaid circumstances we are of the opinion that the benefit of doubt will have to be given to the accused nos.3,4 and 8.

17. Coming to the case against accused nos.1,2 and 7, names of these three accused had appeared in the F.I.R. which was lodged by the complainant, who is none other than the brother of the deceased, immediately after the incident of assault and abduction of deceased Suhas from the Pandal erected for the ‘haldi’ program and the dinner. The names of accused nos.1 and 2 were mentioned in the invitation card, they being the close relations of the host. Even the presence of the complainant, his wife and the deceased cannot be disputed. The complaint lodged by accused no.1 itself mentions the presence of deceased Suhas in that Pandal at the time of the incident. The incident is not disputed by the accused having taken place in the Pandal on the night of the incident where people had collected for the ‘haldi’ program. The residential house of deceased and complainant P.W.1 Suhdir is at a distance of hardly three minutes walk from the place of incident. Madhukar and his sister Asha whose ‘haldi’ program was arranged that night are related to complainant’s wife’s aunt. Madhukar Bhoir

is the son of complainant's wife's aunt and Asha is the daughter of complainant's wife's aunt. Complainant and his deceased brother Suhas were residing together. Since Madhukar and Asha whose 'haldi' ceremony was arranged were related to the complainant through his wife and, therefore, his wife Indumati P.W.2 was also having reason to be present in the Pandal. The complaint itself mentioned the names of these three persons who were known to the complainant. Even on behalf of the accused documents have been produced to show that there was previous enmity because of the cases filed against the deceased in which accused were witnesses and, therefore, they were known to each other. Accused no.7 in his 313 statement has also admitted the relationship between P.W.1, P.W.2 and P.W.3 with Gangubai Gaikwad in whose house the haldi ceremony was arranged. When the complaint was lodged immediately after the incident in which the complainant's brother, after being assaulted was dragged from the Pandal and abducted the complainant would not have lodged complaint falsely implicating any of the accused nos.1,2 and 7. The complaint assigns role to all these three accused persons for having assaulted Suhas with choppers. All the three accused persons were known to the complainant. He did not mention the names of others

who, according to the complainant, had assaulted the deceased with fist blows and kicks, as they were not known to him.

18. It is also pertinent to note that there is a mention of use of choppers and the fire arm in the counter complaint filed by the accused no.1 and the deceased had received injuries both with choppers as well as fire arm. If the deceased or his associates, as alleged in the counter complaint lodged by accused no.1, were armed with weapons like fire arm and choppers and particularly fire arm, the accused would not have dared to abduct deceased Suhas from the Pandal in the presence of his brother and other invitees at the function which is stated to be attended by few hundreds of people. Nor the complainant would have been a silent spectator when his brother, after being assaulted was dragged and abducted in his presence from the said Pandal if deceased and his associates were armed with fire arm and choppers. Surprisingly there is no mention to the presence of P.W.1 in the counter complaint filed by accused no.1. If the deceased Suhas could be present at the haldi ceremony, surely his brother complainant Sudhir and his wife would be present there because Madhukar Bhoir and his sister Asha Bhoir, whose haldi

ceremony was arranged, were related to the wife of complainant Sudhir and not to deceased Suhas whose presence in the said Pandal is mentioned even in the counter complaint filed by accused no.1.

19. Complainant P.W.1 Sudhir, in his evidence, has deposed that Gangubai Gaikwad, in whose house the haldi ceremony of Madhukar and Asha was observed, was the aunt of his wife. He had gone to attend the said ceremony along with his wife and brother deceased Suhas and his maternal uncle Ulahs Thavai P.W.3. They had gone there at about 10 p.m. in the night. While they were waiting for the dinner which was about to be served, there was pelting of chairs towards the direction of his brother Suhas. Accused Nos.1,2 and 7 started assaulting Suhas with choppers and other persons with fists and kicks. Thereafter Suhas was dragged outside the Pandal and taken away in a Jeep. He went running to his house to inform his father about the said incident and thereafter went to the Kolshewadi Police Station along with his father where his complaint Exh.33 was lodged. Next day evening when he learnt that one dead body was lying on the goods track near Kalyan Railway Line, he went there along with his father and identified the dead body of his brother Suhas. His evidence is corroborated by

his wife P.W.2 Indumati and his maternal uncle Ulhas Thavai P.W.3 so also P.W.4 Dayanand Javale. The presence at the place of incident of P.W.2 can never be doubted because the haldi ceremony was taking place in the house of her aunt Gangubai. P.W.3 on that day had been to the house of his nephew complainant Sudhir and, therefore, he was also taken by P.W.1 and P.W.2 along with them for the dinner in the house of Gangubai. P.W.4 is Dayanand Javale who has deposed that he had gone to the place of incident at about 9.45 p.m. to attend the dinner which was arranged at the haldi ceremony. He has also named accused nos.1,2 and 7 being the persons who were assaulting deceased with choppers in their hands.

20. The evidence of three eye witnesses i.e. P.Ws. 2 to 4 has been criticised, firstly, on the ground that their statements were recorded belatedly on 9/5/1990. Secondly, it is argued that their names have not been mentioned in the complaint lodged by P.W.1. Thirdly, it is argued that P.W.3 does not appear to have been invited at the function and, therefore, there is doubt whether he had attended the said function. The evidence of these witnesses is also criticised on the ground of discrepancies and that the witnesses had not given the events of the

incident in proper sequence.

21. Firstly, it cannot be said that the statements of these witnesses were recorded belatedly after three days. The incident in question had taken place late night on 6/5/1990. At that time there was complaint of only assault and abduction of Suhas and, therefore, the first and foremost priority before the police was to trace Suhas. That time no one must have expected that Suhas would be killed until his dead body was traced next day afternoon. By the time the dead body was identified and inquest panchanama was drawn and the body was taken in possession by the police it was late evening or early night of 7/5/1990. Thereafter the dead body was sent for post mortem examination. On 8th of May 1990 I.O. was busy with getting the post mortem examination of the dead body and tracing of two jeeps which were used by the accused for abducting deceased Suhas in one jeep and for carrying the rest of the accused from the place of incident in the other jeep that night. The clothes of the deceased were also attached under panchanama Exh.53 on 8/5/1990 after post mortem examiantion. It was on that day that the police had to obtain remand against accused nos.1 and 2 who were arrested on the earlier day and produced before the Magistrate on 8/5/1990.

It was thereafter only that the police could have recorded the statements of the other witnesses including the eye witnesses on 9/5/1990.

22. The criticism of non mentioning of names of other eye witnesses in the complaint itself cannot be the ground to disbelieve the other eye witnesses about their presence. As observed earlier the presence of P.W.2 Indumati, the wife of complainant was natural as it was she who was related to Gangubai in whose house the haldi ceremony was arranged. If complainant and his brother deceased Suhas were there, they were there because of relationship with Indumati P.W.2. Even when the complaint with regard to abduction of Suhas was lodged, the complainant cannot be expected to mention the presence of his wife and the other eye witnesses in the complaint when there was assembly of hundreds of persons at the said function. Non mentioning of names of other eye witnesses cannot be the ground to disbelieve their presence at the place of incident. In this case it is particularly so because the complaint was with regard to the assault and abduction of Suhas by the accused persons and not of murder. It is well settled that F.I.R. is not intended to be a detailed document which must mention each and every minor fact. The trial court has

referred to the decision of the apex court in the case of Narpal Singh and others vs. State of Haryana reported in **AIR 1977 SC 1066** in which it is held that non mentioning of the name of the witness in the F.I.R. examined at the trial though of some relevance would not be sufficient by itself to reject the evidence of that witness. We see no reason why the prosecution should have led the evidence of P.W.3 Ulhas Thavai, the maternal uncle of the complainant if he was not present at the place, date and time of the incident. P.W.4 Javale is not even related to the deceased or the complainant. In our view even if we were to exclude the evidence of P.Ws.2,3 and 4, the evidence of complainant P.W.1 corroborated by the immediate complaint lodged by him is sufficient to believe not only the presence of accused nos.1,2 and 7 at the place of incident but also the role attributed to them by the complainant in his deposition supported by the complaint which is further corroborated by the medical evidence and recoveries of blood stained weapons and clothes made at the instance of accused no.1.

23. The prosecution has also led evidence about the motive. The deceased was the Shakha Pramukh of Tisgaon in Kalyan which is a big town and a Taluka

place in District Thane. The accused belonged to Janta Party. The dispute was there between them on the construction of Shivsena office in Tisgaon about 5 years before the incident. This is stated by P.W.4 in his deposition. On behalf of the accused certain documents have been produced under Section 294 of Cr.P.C. which include charge-sheet which was filed against the deceased in which the name of accused no.1 was shown as witness. Thus, there is evidence of motive also on the record. Even P.W.1 Sudhir has deposed that there was enmity between his brother Suhas and Accused No.1 Bhagwan Bhoir and Accused No.2 Pandit Bhoir as well as Accused No.7 Ananta Gavali.

24. The prosecution has examined P.W.5 Dr. Bhide who was the Medical Officer attached to the Rukminibai Hospital, Kalyan. He had conducted the post mortem on 7/5/1990 between 5.20 p.m. and 6.20 p.m. He noticed following 11 external injuries on the dead body:-

1. Burrows over left mammary region surrounding area is black subutaneous tissue black. 3/4 x 1/4 upto ribs. 25.

2. Burrows medial side of left mammary region 1/2" below previous injury. 3/4" x 1/2".

3. Burrows 4" below the left mammary region diameter 3/4" x 1" x 1/4".

4. Scratch mark over abdomen below mammary region below sternum left side 3".

5. Scratch mark semicircular 2 1/2" below and continues to previous injury.

6. Scratch mark over right lower chest 3 1/2" transverse.

7. Incised wound over back left side 3" above iliac bone 2" x 1/4" x 1/4" skin deep.

8. Scratch mark 1/2" below previous injury scratch mark 3 1/2" long transverse.

9. Incised wound over left lip 1/2" x 1/4".

10. C.L.W. over left occipital region 1" x 1/4" x 1/2".

11. C.L.W. right frontal region (top) scalp deep 2" x 1/4" transverse fracture 1".

. On internal examination Medical Officer found C.L.W. over left occipital region 1" x 1/4" x 1/2". The internal wound was fracture of frontal right side bone 2" x 1/4" transverse scalp deep fracture was 1". There was also subarchnoid haemorrhage in the brain. The internal fracture corresponded to the external injury no.11. He had noticed bleeding through the nose and mouth. The external Injury Nos.1 to 3 were caused by fire arm and injury nos.4 to 9 were caused by light and sharp object as per the evidence of Medical Officer. He has deposed that external injury nos.10 and 11 were caused by hard and blunt object. The cause of death has been given as shock due to subarchnoid haemorrhage due to head injury. He has

further deposed that external injury nos.10 and 11 were sufficient to cause death in ordinary course of things. On being shown choppers (article nos.8 and 9) recovered at the instance of accused no.1 and chopper (article no.22) recovered at the instance of accused no.7, he has deposed that external injury nos.10 and 11 were possible by the use of article nos.8,9 and 22 if they were used from their blunt side. According to him, external injury nos.4 to 9 were not possible by use of article nos.8,9 and 22 if they were used from their sharp side. Thus, the medical evidence also supports ocular evidence that accused had assaulted the deceased with choppers.

25. On behalf of the defence it is argued that in the absence of the evidence whether the choppers were used from blunt side the presumption is that sharp edged weapons must have been used from sharp side and in that event medical evidence does not support the version of the eye witnesses because fatal injuries were not incised wounds but were contused lacerated wounds. As per the post mortem report injury nos.7 and 9 were incised wounds which were on the left side back of the deceased and over his left lip which were not stated to be fatal or cause of death. The injury nos.10 and 11, which were C.L.Ws. and were opined by

the doctor to be the cause of death, were on the occipital region and frontal region i.e. on the skull of the head. In our opinion that portion of the head being hard because of skull, even if assault is given from the sharp side of the weapon it may cause C.L.Ws. instead of incised wounds. The evidence of the doctor is after all an opinion evidence and when the doctor deposed that injury nos.10 and 11 which were fatal injuries were possible by choppers if used from their blunt side cannot be taken to mean that there would not have been C.L.Ws. at all in case those choppers were used from their sharp side. Moreover, it must not have been possible for the complainant to notice whether all the accused persons had assaulted the deceased with choppers from the blunt side or sharp side. The trial court has also referred to the judgment of the apex court in the case of Solanki Chimanbhai Ukabhai vs. State of Gujrat reported in **AIR 1983 SC 485** wherein it was held that ordinarily, the value of medical evidence is corroborative and unless the medical evidence goes to the extent of completely ruling out all possibilities whatsoever of injuries taking place in the manner alleged by the eye witnesses, the testimony of the eye witnesses cannot be thrown out on the said ground.

26. The next argument advanced on behalf of these three accused is that the prosecution is silent as to how the deceased happened to receive injuries by fire arm. If the accused had wielded fire arm at the place of incident nothing would have prevented the complainant from mentioning the same in his complaint itself. We cannot forget that after having been assaulted Suhas was dragged by the accused persons outside the Pandal and taken away in a jeep which was waiting or parked outside the Pandal. What happened subsequent to the abduction of deceased Suhas is within the exclusive knowledge of the accused persons who had abducted him. It was argued on behalf of the main accused that the prosecution is silent about the use of fire arm and no investigation was made, nor any effort seems to have been made to recover the fire arm which was as per the medical evidence used against the deceased as he had suffered three injuries which were possible with the use of fire arm. No doubt that is a lapse on the part of the investigating agency but the said lapse cannot falsify prosecution case. The injuries caused by fire arm were not the cause of death of the deceased and for not tracing the fire arm which appeared to have been used against the deceased the main prosecution case cannot be thrown overboard. In the case of Ram Bihari Yadav vs. State of Bihar

and ors. reported in **(1998) 4 SCC 517** the Supreme Court has held that the interest of justice demands that an act or omission of the investigating agency should not be taken in favour of the accused. It was observed in paragraph 13 of the said Judgment as follows:-

> "13. .....the interest of justice demands that such acts or omissions of the officers of the prosecution should not be taken in favour of the accused, for that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellant. In such cases, the story of the prosecution will have to be examined dehors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law-enforcing agency but also in the administration of justice."

27. The fact that the complainant was helpless and could do nothing except to remain a silent spectator even when his brother after assault was dragged outside the Pandal in the presence of hundreds of people gathered there, would go to show the magnitude of the terror which must have been generated by the accused persons during ‘haldi’ function. Thereafter the complainant first went to inform about the incident to his father and then along with him went to the police station and lodged F.I.R. In all probability the assault made on Suhas in the Pandal

itself might have ultimately resulted in the death of Suhas. Injured Suhas must have been in critical condition when he was dragged outside the Pandal and taken away in the jeep. His body was ultimately found hardly one and half kilometre away from the place of incident.

28. The reference to the fire arm in the counter complaint filed by accused no.1 is significant. It is stated in the said complaint which is produced by the prosecution at the instance of the accused that deceased Suhas had fired from the revolver which he was carrying and his associates also had fired from the other revolver carried by them and the others were carrying choppers in their hands. The falsity of this counter complaint is quite obvious from the contents of the complaint itself. If Suhas as well as his associates had carried revolvers in their hands, surely the accused would not have dared to assault Suhas, drag him outside the Pandal and abduct him in their jeep. The reference to the holding of or firing from the revolvers by Suhas and his associates seems to have been made deliberately in the counter complaint in order to explain the injuries of the deceased caused by fire arm and to project him as

aggressor. In the spot panchanama Exh.64 there was no reference to the evidence of use of fire arm at the place of the incident. The investigating agency does not seem to have collected any evidence of use of revolver at the place of offence. Even the accused do not seem to have used or fired from the fire arm if any carried by them at the place of incident, otherwise complainant would not have omitted to refer to the same in his complaint Exh.33. The accused having used choppers and fire arm to assault the deceased must have referred to the said weapons in the counter complaint. We cannot, therefore, find fault with the investigating agency if "A" Summary was filed in the counter complaint lodged by accused no.1.

29. On behalf of the accused it was argued that accused no.1 whose complaint was registered at 11.45 p.m. on that night and accused no.2 having been admitted to the hospital of Dr. Mahajan, they could not have been at the place of incident where Suhas appears to have been murdered and his body thrown on the goods track near Kalyan Railway line. Reliance is placed on the medical certificate issued by Dr. Mahajan which states that accused no.2 was admitted to his hospital at 10.40 p.m. on that night. The said medical certificate was produced under Section 294 of

Cr.P.C. First of all one would raise doubt as to why accused no.2 was admitted in a private hospital instead of the Civil Hospital for the minor injury which was suffered by him, if it was a medico legal case. His injury was simple and so he was discharged on the next day evening. Accused No.2 could have been taken to the Police Station and then Police would have referred him to the Civil Hospital under a 'Yadi'. One cannot be very precise about the time of the incident which took place in the Pandal, even assuming that the time mentioned by the private practitioner for having admitted accused no.2 in his hospital was faithfully and correctly recorded. The deceased had received serious blows with choppers on his head at the place of incident itself. The accused were strong enough to create an awe which prevented the complainant even to make an attempt to save his brother from the clutches of the accused. Probably that was the wise thing he did, otherwise he would have been the next target if he had ventured to intervene to save his brother. When the accused persons had abducted deceased Suhas after assaulting him and thereafter his dead body was found, it is only the accused persons who knew how the dead body of Suhas was found on the goods track at Kalyan Railway line. The accused not having given any explanation as

to how the dead body of Suhas was found there next day, they alone can be held responsible for the death of Suhas. The deceased having been assaulted with weapons like choppers and then abducted in a jeep by the accused the latter only knew how deceased received injuries with fire arm and met his death.

30. The evidence of the eye witnesses and particularly of the complainant corroborated by the immediate complaint lodged by him shows that Suhas was dragged outside the Pandal by the accused after assault and taken to the jeep and then the jeep disappeared. Ultimately, the dead body was found hardly one and half kilometres away from the place of initial assault on him. There were two jeeps, one belonging to accused no.7 who was present at the place of the incident and another belonging to the family of accused nos.1 and 2 which stood in the name of their father. In all probability the deceased Suhas must have been taken into the jeep belonging to the accused no.7 in which blood was noticed. From the panchanama of attachment of the jeeps Exh.53 dated 8/5/90, it appears that police had to minutely observe and find out whether there were any blood stains in the jeep. The seat cover of that jeep was blue and therefore it was difficult to notice the marks of blood which were

faint and found in the joint. The other jeep standing in the name of father of accused nos.1 and 2 must have been used by accused nos.1 and 2 for first going to the hospital of Dr.Mahajan and thereafter by accused no.1 for going to the police station to lodge the counter complaint after the murder and disposal of the dead body of Suhas.

31. Though the complaint Exh.33 lodged by the P.W.1 was registered at 11.30 p.m. that night, according to the deposition of P.W.1 he had gone to the police station earlier and had to wait for the P.S.I. to arrive there for about half an hour. Thereafter he must have narrated the incident to the Police Officer who reduced it to writing and then the crime was registered. It means the complainant must have gone to the police station between 10.30 p.m. and 10.45 p.m. Considering the fact that immediately after the incident complainant had first gone to his house, informed about the incident to his father and then along with his father went to the police station where he had to wait for half an hour for the P.S.I. to arrive before his detailed complaint was recorded, it was quite possible for the accused nos.1 & 2 in the meantime to commit murder of the deceased along with other accused, throw the dead body on the railway

track and then go to the Police Station. Except producing medical certificate from a private doctor no evidence is led on behalf of the defence to prove the injuries of accused no.2.

32. The fact that accused nos.1,2 and 7 were known to P.W.2, the wife of the complainant, is admitted by accused no.1 in his answer to question no.35 in his statement under Section 313. It is surprising that he denied as false that P.W.1 complainant the husband of P.W.2 knew accused nos.1,2 and 7 in answer to question no.4 in his statement under Section 313. On the other hand accused no.2 pleads ignorance whether P.W.1 knew the accused but denies as false that P.W.2 knew the said accused. Accused no.7 admits in answer to question no.4 that P.W.1 knew accused nos.1,2 and 7 but in answer to question no.35 does not deny that P.W.2 knew him and stated that she might be knowing him.

33. The fact that P.Ws. 1, 2 and 3 are closely related to the deceased cannot be the ground for rejecting the testimony of those witnesses. As stated earlier even if the evidence of P.Ws. 2,3 and 4 is not considered, the evidence of P.W.1 corroborated by the immediate complaint filed by him and the medical evidence can very well be relied against the accused.

In this respect the trial court has rightly relied on the judgment of the Supreme Court in the case of Darya Singh and others vs. State of Punjab reported in **AIR 1965 SC 328**, in which it is held that when the eye witnesses are closely related to the victim their evidence can be closely scrutinised but corroboration for acceptance of that evidence is not necessary. Similarly reference is made by the trial court to the judgment of the Supreme Court in the case of Guli Chand and others vs. State of Rajasthan reported in **AIR 1974 SC 276**, in which it was held that mere fact that witness is a relation of a victim is not sufficient to discard his testimony. The fact that names of the eye witnesses like P.Ws.2,3 and 4 are not mentioned in the F.I.R. cannot be the ground to reject the evidence of the eye witnesses as held in the case of Narpal Singh and others vs. State of Haryana reported in **AIR 1977 SC 1066**.

34. The next argument advanced on behalf of the accused is that the injury of accused no.2 was not explained by the prosecution. First of all that injury was a minor injury for which even admission to the hospital was not necessary. The non explanation of such minor injury cannot be used to reject the prosecution case when the evidence of eye witness

corroborated by the immediate complaint is sufficient to prove as to who was the aggressor. Unless the accused were armed with weapons and the victim and his brother were without arms, the accused would not have dared to drag the victim and abduct him in a jeep in the presence of his brother and hundreds of people collected there. The trial court has in paragraphs 44 and 45 of the judgment referred to some judgments of the apex court, including the judgment in the case of Venu vs. State of Tamilnadu reported in **1994 SCC (Cri) 40** in which it was held that when eye witnesses are giving consistent version of the occurrence, failure of the prosecution to explain some minor injuries received by the accused during the scuffle is inconsequential.

35. Prosecution has also led evidence of recovery of the blood stained choppers and blood stained clothes of accused nos.1 and 2 at the instance of accused no.1. In that respect the prosecution has examined the panchas who had turned hostile. But the trial court has rightly placed reliance on the evidence of I.O. in respect of that recovery. The panchas have admitted their signatures on the panchanamas regarding the memorandum of statement Exh.46 made by the accused no.1 and also the seizure

panchanama Exh.47. That recovery was made at the instance of accused no.1 while he was in custody. Though accused nos.1 and 2 were arrested on 7/5/1990 the I.O. was busy with the investigation in this case alone upto 9th May 1990 when the statements of number of eye witnesses and other witnesses were recorded. The discovery of weapons and clothes at the instance of accused no.1 was, therefore, made on 10/5/1990. Two choppers were recovered which are article nos.8 and 9 which are shown at Sr. Nos.7 and 8 in the C.A. report. Both the choppers were blood stained. As per the C.A. report Exh.69 human blood was found on one of the choppers and the blood noticed on the other chopper was so disintegrated that its origin could not be determined. It is well settled that finding of human blood on the clothes of the accused or on the weapons recovered at the instance of the accused is a circumstance which can be used against the accused.

36. In any event finding of human blood on one of the choppers recovered at the instance of accused no.1 is a circumstance against the accused. There was also recovery of two pairs of shirt and pant at the instance of accused no.1 on the same day, which is sufficiently proved by the evidence of I.O. There is nothing brought on record to discard the evidence of

I.O. as regards the recovery of the blood stained clothes at the instance of accused no.1. Those clothes were also sent for examination by C.A. and as per the C.A. report Exh.69 blood of group "A" was found on the two shirts and human blood was found on two pants produced or recovered at the instance of accused no.1. Those clothes were produced by accused no.1 which were kept in his house as supported by panchanamas Exhs.50 and 50-A. Even the clothes of the deceased which were seized under panchanama and sent to C.A., as per the C.A. report Exh.69, were stained with blood of group "A". These circumstances were put to the accused nos.1 and 2 but except simply denying the correctness of the same the accused have not given any explanation as to how and whose blood was found on those clothes or on the weapons which were recovered at the instance of accused no.1. Thus the finding of blood on the choppers recovered at the instance of accused no.1 and also the clothes stated to be of accused nos.1 and 2 though produced at the instance of accused no.1 from their common house in which both the accused nos.1 and 2, who are brothers, were residing, is an important and significant circumstance which corroborates the evidence of eye witnesses that these accused had assaulted the deceased with choppers. Thus the evidence of the complainant and other eye

witnesses corroborated by the F.I.R. immediately lodged and further corroborated by the medical evidence and supported by the recovery of blood stained weapons and the clothes clearly proves the guilt of accused no.1.

37. So far as the accused no.2 is concerned, the evidence of the complainant and the other eye witnesses corroborated by immediate complaint in which he is also named amply proves the involvement of accused no.2 in the offence in question. The presence of accused nos.1 and 2 at the place of incident is not even denied as is clear from the counter complaint lodged by accused no.1 and the injury suffered by accused no.2, which according to the accused was received during the same incident. It was argued on behalf of accused no.2 that there is no recovery made at the instance of accused no.2 and the recovery of weapons and clothes made at the instance of accused no.1 cannot be used against him. No doubt there is no recovery made under Section 27 of the Evidence Act as such at the instance of accused no.2 of his clothes as well as chopper allegedly used by him. But it cannot be forgotten that accused nos.1 and 2 are brothers residing together. The accused no.1 had taken his brother accused no.2 to the hospital and then went to

the police station to lodge the complaint and, therefore, it was accused no.1 who knew where those two choppers used by these two brothers were kept and where were the clothes of accused no.2 kept which were recovered from the same house at the instance of accused no.1. Those weapons and clothes must have been hidden by these accused in their house before proceeding to the hospital and the Police Station. Even without that circumstantial evidence, the evidence of motive and the evidence of eye witnesses corroborated by the complaint and the medical evidence is sufficient to prove the guilt of accused no.2 for having participated in the incident in question.

38. It was then argued on behalf of accused no.2 that the murder had taken place subsequently after the abduction of deceased Suhas and, therefore, Section 149 of the Penal Code would not be applicable so far as the accused no.2 is concerned for the offence of muder as well as other offences. In our view the fact that accused no.2 was the brother of accused no.1 and had come along with latter armed with chopper and had participated in the assault on deceased Suhas and was party to the abduction of deceased Suhas in the jeep after the assault and thereafter the dead body was

found cannot separate him from the incident in question. There is evidence that accused no.2 had also assaulted Suhas with chopper. In all probability Suhas might have died due to the assault made on him in the Pandal. Moreover, there can be no doubt that both accused nos.1 and 2 must have been party to the assault on Suhas after he was abducted. Thereafter they must have gone to the private hospital. However, the reading of Section 149 would itself make it clear that accused nos.1 and 2 being members of unlawful assembly they are vicariously liable even if it is assumed that they were not party to the subsequent assault on Suhas after his abduction. Section 149 of I.P.C. reads as follows:-

> "149. **Every member of unlawful assembly guilty of offence committed in prosecution of common object. -** If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

39. It is not necessary under the aforesaid provision that every member of the unlawful assembly should participate in the fatal blow. What is important is the sharing of common intention or common

object of the unlawful assembly. If accused no.2 comes to the place of incident in the company of accused nos.1 and 7 and their associates, participates in the assault on the deceased and was also party to the abduction of deceased Suhas, getting himself admitted in a private hospital for a minor injury cannot absolve him of his vicarious liability for the offence of murder as he was member of the unlawful assembly common object of which was to murder Suhas.

40. It is not that he had not participated in the assault at all. Not only he participated in the initial assault but also had participated, as per the version of eye witnesses, in abducting the deceased Suhas. As per the medical evidence the injuries received by the deceased on his head were cause of his death which were possible with the use of chopper. Accused No.2 had also assaulted the deceased with a chopper. The accused no.2, therefore, cannot escape the guilt for the offence of murder. In all probability he might have given the fatal blow on the head of the deceased with a chopper. Having the advantage of two jeeps in the possession of the accused and the fact that the dead body of Suhas was found at a very short distance of one and half kilometres from the place of initial incident, accused

no.2 cannot distance himself from the fatal assault on the deceased. In any event being a member of unlawful assembly with the common object of murdering the deceased, the accused no.2 cannot escape his liability for the said offence. The fact that deceased was assaulted with deadly weapons and thereafter abducted and then his dead body was found, is sufficient to draw the inference that there was unlawful assembly of the accused with common object to murder Suhas.

41. Coming to the evidence against accused no.7, he is named in the complaint immediately lodged by P.W.1. He is a friend of accused nos.1 and 2. Even he admits in his 313 statement that P.W.2, the wife of the complainant P.W.1, might be knowing him and, therefore, his presence and participation in the assault by chopper is squarely proved against him as it is proved against accused nos.1 and 2. The police had attached his jeep bearing No.MZM-7832 under panchanama in the morning of 8/5/1990 i.e. after the dead body was traced on the previous evening. The attachment of his jeep is proved by P.W.11 Prakash More. Though he has stated in examination-in-chief that there were some read coloured stains on the seat inside the jeep but in the cross-examination he stated that he did not personally see the stains. But he has

proved the panchanama of attachment Exh.53 which is also proved by I.O. P.S.I. Hulyalkar. The portion of the seat cover of the jeep on which read coloured stains were seen in the joint was cut out and sent for the examination by C.A. and as per the C.A. report Exh.69 human blood was noticed thereon, which has not been explained by accused no.7. The faint blood stains found on the joint of blue coloured seat cover may not have been visible unless minutely observed and, therefore, accused no.7 must not have taken care to clean them.

42. The prosecution has also relied on the recovery of chopper at his instance which was made on 15/9/1990. He was arrested on 13/9/1990. The chopper was recovered at his instance from a gutter and, therefore, it was having mud around it. Since no blood was found on the chopper it cannot be used as a circumstance against him. But it is significant to note that though his name was disclosed in the F.I.R. itself immediately after the incident, he was not available for his arrest until 13/9/1990. That means he was absconding for a period of more than 4 months. We cannot attribute so much lethargy to the investigating machinery and presume that police would not have taken care even to make some efforts for the

arrest of accused no.7 whose name was mentioned in the F.I.R. as being party to the assault on a person whose dead body was traced on the following day. That he was known to P.W.1 is admitted by him in answer to question no.4 in his Section 313 examination. He is resident of Tisgaon i.e. the same place where the complainant and his wife and the deceased were residing. In answer to question no.35 he has replied that P.W.2 might be knowing him.

43. Thus the prosecution has squarely proved the guilt of accused nos.1,2 and 7 for having assaulted Suhas with chopper and then abducted him for murder and for having murdered him. They were also rightly convicted for offence under Section 201 read with Section 149 of IPC as the body was found on the goods track near Kalyan Railway line to create impression that he must have met with an accident. In fact, no arguments were advanced in that respect on behalf of the accused challenging their conviction for offence under Section 201 of I.P.C. Accused were also convicted for offence under Sections 147, 148 of IPC but no separate sentence was awarded on those counts. We, therefore, find no flaw in the order of conviction and sentences recorded by the trial court against accused nos.1,2 and 7.

44. In the result, we confirm the order of conviction and sentences recorded by the trial court against appellants-original accused no.1 - Bhagwan Atmaram Bhoir, No.2 - Pandit Atmaram Bhoir and No.7 - Ananta Gopal Gavali but set aside the order of conviction recorded by the trial court against appellants-original accused no.3 - Krishna Mahadu Gavali, No.4 - Raju @ Abdul Rajjak Shaikh and No.8 - Nanu Rambharansingh and acquit them.

. Consequently, Criminal Appeal No.307/1994 is dismissed. Criminal Appeal No.309/1994 is allowed so far as appellant no.1 i.e. original accused no.3 and appellant no.3 i.e. original accused no.8 are concerned, but dismissed as regards appellant no.2 i.e. original accused no.7. Criminal appeal No.343/1994 is allowed.

. The bail bonds of appellants-original accused nos.3,4 and 8 shall stand cancelled.

. The counsel in Cri. Appeal Nos.307/94 and 309/94 apply for 12 weeks time to surrender as the accused want to file appeal in the Supreme Court. Considering the request of the counsel, we grant six

weeks time to appellants-original accused nos.1,2 and 7 to surrender to their bail bonds. On the expiry of the said period they shall be taken into custody.

(S.S. Parkar, J.)

(Anoop V. Mohta,J.)